Supreme Court, U.S.
FILED
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No. 117 (1)

In The
Supreme Court of the United States

JAMES HENRY RHONE,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fifth District of Texas

PETITION FOR WRIT OF CERTIORARI

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January 27, 2009

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QUESTION PRESENTED

Whether a defendant is prejudiced under the Speedy Trial Clause of the Sixth Amendment when the State delays trial, over the defendant's objection, in order to gain an evidentiary benefit that it lacked originally because of its own negligence.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINION BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 1

Procedural History 2

Proceedings on Appeal 3

REASONS FOR GRANTING THE PETITION ... 3

A. Delay to strengthen the State's case is prejudicial to a defendant. 4

B. A showing of prejudice to a defendant from delay does not require intentional delay by the State. 6

CONCLUSION 7

APPENDIX

Appendix A: Opinion from the Court of Appeals, dated June 30, 2008 ..... 1a

Appendix B: Refusal of the Petition for Discretionary Review from the Court of Criminal Appeals, dated October 28, 2008 .. 10a

Appendix C: Motion to Dismiss for Failure to Afford Speedy Trial and Order signed by the Judge, dated January 3, 2007 ..... 11a

Appendix D: Transcript of the Hearing on the Motion to Dismiss for Failure to Afford Speedy Trial, dated February 22, 2007 ..... 17a

Appendix E: Amendment VI of the United States Constitution. 33a

TABLE OF AUTHORITIES

CASES

Barker v. Wingo,
407 U.S. 514 (1972) 1, 3, 4, 5, 6, 7

Doggett v. United States,
505 U.S. 647 (1992) 7

Pollard v. United States,
352 U.S. 354 (1957) 4

Rhone v. State, No. 05-07-00729-CR,
2008 WL 257968 (Tex. App.–Dallas June 30,
2008, pet. ref'd) 1, 7

United States v. McWilliams,
163 F.2d 695 (C.A.D.C. 1947) 4, 5

CONSTITUTION

U.S. Const. Amend. VI 1, 3

STATUTES

28 U.S.C. § 1257(a) 1

OPINION BELOW

The opinion of the Court of Appeals for the Fifth District of Texas in Dallas affirming the trial court's judgment (Pet. App. A) is unreported, but is available at *Rhone v. State*, No. 05-07-00729-CR, 2008 WL 2579681 (Tex. App.–Dallas June 30, 2008, pet. ref'd) (not designated for publication).

JURISDICTION

The Court of Criminal Appeals of Texas refused Rhone's petition for discretionary review on October 29, 2008. (Pet. App. B.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

RELEVANT PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution reads, in pertinent part, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .
(*See*, Pet. App. E for full text).

STATEMENT

This is a case involving the Speedy Trial Clause of the Sixth Amendment to the United States Constitution. U.S. CONST. AMEND. VI. As the case comes to this Court, there is no dispute that James Rhone's trial was delayed almost ten months because of the State's negligence. This was sufficient to trigger an analysis under *Barker v. Wingo*, 407 U.S. 514 (1972), to determine whether the delay violated the Speedy Trial Clause. Moreover, it is undisputed that

approximately one year passed between the time the underlying sexual assault offense was reported (six months from the date of Rhone's arrest) before the State discovered it had failed to send DNA samples collected in the case to the lab for testing, and that an additional eight months passed between the time the samples were forwarded to the lab and the results were returned. (Pet. App. D) It is also undisputed that the State moved for continuances of Rhone's trial twice in order to test the DNA samples, and that the continuances, granted over Rhone's objection and demand for a speedy trial, allowed the State to obtain incriminating DNA evidence it would not have had if the trial had proceeded as originally scheduled. (Pet. App. D)

Nevertheless, the court of appeals affirmed the trial court's denial of Rhone's motion to dismiss for failure to afford a speedy trial on the ground that Rhone had failed to show he was prejudiced by the delay. (Pet. App. A)

Procedural History

Rhone was convicted of the offense of sexual assault of a fifteen-year old child and sentenced to ten years' confinement and a fine of $10,000.00. The imposition of the sentence was suspended, and Rhone was placed on community supervision probation for a period of ten years. (Pet. App. A) Rhone appealed his conviction to the Court of Appeals for the Fifth District of Texas, and his conviction was affirmed. (Pet. App. A) The Texas Court of Criminal Appeals refused Rhone's petition for discretionary review. (Pet. App. B)

Proceedings on Appeal

The Court of Appeals for the Fifth District of Texas affirmed Rhone's conviction, holding that the trial court did not err by denying Rhone's motion to dismiss for failure to afford a speedy trial. (Pet. App. A) Specifically, the court of appeals held that all of the *Barker v. Wingo* factors weighed in Rhone's favor except that Rhone failed to demonstrate prejudice resulting from the delay because his complaint was not that he was somehow precluded from properly preparing his own defense, but instead that the State benefitted from its own negligence. The Court of Appeals explained as follows:

> As to whether appellant's defense was impaired by the delay, appellant is essentially arguing that the delay allowed the State to obtain incriminating DNA evidence it would not have had if trial had proceeded as originally scheduled. This is not the kind of impairment, such as loss of exculpatory evidence and dimming memories, discussed in *Barker*.
>
> (Pet. App. A)

REASONS FOR GRANTING THE PETITION

The court of appeals' decision involves an important question under the Sixth Amendment, to wit, whether prejudice under the Speedy Trial Clause of the Sixth Amendment from the denial of a speedy trial includes an evidentiary benefit gained by the State because of a delay of the defendant's trial necessitated by the State's negligence.

A. Delay to strengthen the State's case is prejudicial to a defendant.

In *Barker*, this Court held that prejudice "should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect." 407 U.S. at 532. This Court identified those interests as follows: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. *Id.* It is this last interest on which the state court of appeals based its decision affirming the denial of Rhone's motion to dismiss his indictment. The state court of appeals concluded that prejudice, as described in *Barker*, was limited to impairments such as loss of exculpatory evidence and dimming memories.

Importantly, in *Barker* this Court cited *Pollard v. United States*, 352 U.S. 354 (1957), for the contention that the Government cannot seek a delay in order to gain a tactical advantage. *Barker*, 407 U.S. at 531 n. 32. In *Pollard*, this Court emphasized that "whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances." *Pollard*, 352 U.S. at 361. This Court ultimately held that the facts in *Pollard* did not constitute a Speedy Trial Clause violation, but it cited *United States v. McWilliams*, 163 F.2d 695 (C.A.D.C. 1947), as an example of a Speedy Trial Clause violation resulting from the State's delay in order to obtain evidence against the defendants.

In *McWilliams*, the court of appeals affirmed the district court's dismissal of indictments of a number of

defendants after the Government failed to try them within two years. *Id.* at 696. As in the present case, the court of appeals specifically noted that the Government's delays were based on its attempts to obtain additional evidence against the defendants: "The Government was not ready to go forward and on at least three occasions time was extended in order that, if possible, new evidence might be obtained." *Id.* The court of appeals in *McWilliams* specifically noted that negligence on the part of the government in trying a defendant constituted grounds for dismissal: "[T]he rule of this jurisdiction is that where there has been a lack of due diligence in the prosecution of a case the trial judge may dismiss and his order will be sustained on appeal." *Id.* at 696-97.

Here, the court of appeals did not consider delay in order to allow the State to strengthen its case to be prejudicial to Rhone. This reasoning defies common sense and is a much too restrictive interpretation of *Barker*. It is extremely prejudicial to a defendant to allow the State to delay trial in order to continue gathering evidence on which to base its prosecution. It is undisputed that the State should have and could have gathered DNA evidence prior to indicting Rhone. If the DNA evidence was not prejudicial to Rhone, then why did the State seek two continuances to obtain the evidence once the State discovered that through its own negligence Rhone's DNA samples had not been forwarded to the lab? The answer is that the State anticipated the prejudicial impact the evidence would have on Rhone's defense.

This Court should grant review to clarify whether prejudice to a defendant includes an advantage to the State resulting from a delay of the defendant's trial at

the State's request. This is an issue on which the state and federal courts require guidance in the interest of the uniform administration of justice.

B. A showing of prejudice to a defendant from delay does not require intentional delay by the State.

Rhone does not contend that the continuances granted by the trial court were the result of intentional delay, but rather that the State failed to exercise diligence in obtaining the DNA evidence. Under *Barker*, negligent delay does not weigh as heavily as intentional delay, but it nevertheless weighs against the State:

> A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily *but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.*

Id. at 529 (emphasis added). This Court has subsequently affirmed this holding:

> *Barker* made it clear that "different weights [are to be] assigned to different reasons" for delay. Although negligence is obviously to be weighed more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and

> unacceptable reasons for delaying a criminal prosecution once it has begun.

Doggett v. United States, 505 U.S. 647, 657 (1992) (considering negligence of government in analyzing prejudice to defendant). Here, the court of appeals held that Rhone failed to demonstrate prejudice because the delay was "not intentional delay by the State." *Rhone*, 2008 WL 2579681 *3. Consequently, the court of appeals did not weigh the negligently caused delay against the State. That holding is contrary to this Court's holdings in *Barker* and *Doggett*, and this Court should grant review to correct this misapplication of *Barker* by the court of appeals.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the Court of Appeals for the Fifth District of Texas.

Respectfully submitted,

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APPENDIX

APPENDIX A

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-07-00729-CR

[Filed June 30, 2008]

JAMES HENRY RHONE,
Appellant

V.

THE STATE OF TEXAS,
Appellee

On Appeal from the 336th District Court
Grayson County, Texas
Trial Court Cause No. 053339-336

OPINION

Before Justices Wright, Bridges, and Mazzant
Opinion By Justice Bridges

James Henry Rhone appeals the trial court's denial of his motion to dismiss for failure to afford a speedy trial. Following the denial of his motion, appellant pled guilty to the offense of sexual assault of a child and elected to have a jury assess his punishment. The jury

assessed punishment at ten years' confinement and a $10,000 fine. In a single issue, appellant complains a trial court erred in denying his motion. We affirm the trial court's judgment.

Because appellant does not challenge the sufficiency of the evidence to support his conviction, only a brief recitation of the facts is necessary. On August 24, 2005, appellant was indicted on a charge of sexual assault of a child. The charged offense was alleged to have occurred on March 26, 2005. On September 6, 2005 a capias was issued for appellant's arrest. Appellant turned himself in on September 12, 2005, posted a $10,000 bond, and was released from custody. Appellant was ordered to comply with a number of bond conditions including reporting two times per month to the Grayson County Community Supervision Department, submitting to a daily curfew, and having no contact with children under seventeen.

Trial was scheduled for March 20, 2006. On March 10, 2006 the State filed a motion for continuance asserting that evidence collected from the complainant during a sexual assault exam had never been sent for testing and that the State had never sought a search warrant for biological samples from appellant for comparison with the evidence obtained from the complainant. The State asked for a three to four month continuance to obtain biological samples from appellant and submit them for DNA comparison to the samples obtained from the complainant. Appellant filed an objection to the State's motion for continuance and a demand for a speedy trial. The trial court granted the State's motion for continuance and ordered trial reset to August 21, 2006. On July 12, 2006 the State filed a second motion for continuance because

the DNA analysis requested by the state in March of 2006 was not complete. Once again, appellant objected to the State's request and demanded a speedy trial. However, the trial court again granted the State's motion for continuance and reset trial on January 15, 2007

The State received the results of the DNA analysis in December 2006. On January 2, 2007 appellant filed a motion to dismiss for failure to afford a speedy trial. Appellant also filed a conditional motion for continuance in which he asked for time to have his own expert review the testing done by the State's expert. The trial court granted appellant's motion for continuance and rescheduled trial for May 21, 2007.

On February 22, 2007, the trial court held a hearing on appellant's motion to dismiss. Appellant testified that he was arrested in September 2005, was prepared to go to trial on March 20, 2006, and opposed the State's subsequent motions for continuance. Appellant testified that, as a result of the delay, he was voted out of his dental practice by his partners and removed from his office. Thereafter, appellant was unable to find another job and was forced to sell his house. Appellant complained that, if his case had gone to trial on either the first or second trial setting, the State would not have had DNA evidence to use against him, and the delay of the trial allowed the State to strengthen its case against appellant. The prosecutor acknowledged that she did not learn until March 2006 the DNA samples taken from the complainant had not been sent off for analysis and that six months passed between the time the offense was first reported and the discovery of the lack of DNA analysis. The trial

court denied appellant's motion to dismiss for failure to afford a speedy trial. This appeal followed.

In his sole issue, appellant argues he was denied his constitutional right to a speedy trial because the State delayed his trial between the original March 20, 2006 setting and the time he was actually brought to trial in May 2007. In determining whether an accused has been denied his right to a speedy trial, a court must use a balancing test "in which the conduct of both the prosecution and the defendant are weighed." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *Dragoo v. State*, 96 S.W.3d 308, 313 (Tex. Crim. App. 2003). The factors to be weighed in the balance include, but are not necessarily limited to, the length of the delay, the reason for the delay, the defendant's assertion of his speedy trial right, and the prejudice to the defendant resulting from the delay. *Barker*, 407 U.S. at 530; *Dragoo*, 96 S.W.3d at 313. No single factor is necessary or sufficient to establish a violation of the right to a speedy trial. *Barker*, 407 U.S. at 530; *Dragoo*, 96 S.W.3d at 313.

The first *Barker* factor, the length of the delay, is measured from the time the defendant is arrested or formally accused. *United States v. Marion*, 404 U.S. 307, 313 (1971); *Dragoo*, 96 S.W.3d at 313. The length of the delay is, to some extent, a triggering mechanism, so that a speedy trial claim will not even be heard until passage of a period of time that is, on its face, unreasonable in the circumstances. *Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker*, 407 U.S. at 530. If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination

of the claim. *Doggett*, 505 U.S. at 652; *Dragoo*, 96 S.W.3d at 314.

In general, courts deem delay approaching one year to be unreasonable enough to trigger the *Barker* inquiry. *Doggett*, 505 U.S. at 652 n.1; *Dragoo*, 96 S.W.3d at 314. Here, appellant was indicted on August 24, 2005 but was not brought to trial until May 21, 2007, an interval of approximately twenty months. This delay was sufficient to trigger the *Barker* inquiry. *See Dragoo*, 96 S.W.3d at 314.

As to the reason for the delay, the record indicates the State acknowledged six months passed between the time the underlying offense was first reported and the State discovered DNA samples taken from the complainant had not been sent off for analysis. However, the record shows the Department of Public Safety crime lab processed the samples sent to them in early March 2006 but did not return any results for eight months. The record shows that, out of the fifty-two weeks in 2006 the trial court conducted thirty-seven jury trials, twenty-one in Grayson County and sixteen in Fannin County. Of the twenty-one cases tried in Grayson County, eighteen or nineteen of those cases were inmate cases receiving priority over bonded cases. Thus, the record shows that much of the delay was attributable to the crime lab taking eight months to return DNA results, a crowded trial docket, and appellant's case receiving a lower priority because appellant was out on bond. To the extent a crowded court docket contributed to the delay, this factor counts against the State. *Shaw v. State*, 117 S.W.3d 883, 890 (Tex. Crim. App. 2003). However, we note that, after the DNA testing was complete, appellant sought a continuance to review the results. Based on

the foregoing, we conclude this factor weighs slightly against finding a violation of the speedy trial right.

As to whether appellant ever asserted his right to a speedy trial, the record is clear that appellant asserted his right each time the State sought a continuance beyond the original March 20, 2006 trial setting. The record shows appellant repeatedly asserted his right but only filed a motion to dismiss for failure to afford a speedy trial after incriminating DNA test results were finally delivered by the crime lab. Nevertheless, this factor weighs in favor of finding a violation of the speedy trial right.

As to the prejudice appellant may have suffered as a result of the delay, when we assess this factor we must do so in light of the interests of defendants which the speedy trial right was designed to protect: (1) to prevent oppressive pretrial incarceration; (2) to minimize the accused's anxiety and concern; and (3) to limit the possibility that the accused's defense will be impaired. *See Dragoo*, 96 S.W.3d at 315. Of these forms of prejudice, the most serious is the last because the inability of the defendant adequately to prepare his case skews the fairness of the entire system. *Id.* Furthermore, with respect to the third interest, affirmative proof of particularized prejudice is not essential to every speedy trial claim because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or identify. *Id.*

Here, appellant turned himself in on September 12, 2005, posted a $10,000 bond, and was released from custody. Thus, appellant did not suffer oppressive pretrial incarceration. As to the anxiety and concern

appellant may have suffered, he contends he suffered substantial anxiety because he lost his home and employment. However, the record shows that, during the time the indictment was pending, appellant entered into a settlement with victims in this case, which could have been seen as an admission of guilt by his dental partners. Only appellant's testimony indicates his termination was solely because an indictment was pending. This financial settlement also may account for appellant's financial difficulties. As to whether appellant's defense was impaired by the delay, appellant is essentially arguing that the delay allowed the State to obtain incriminating DNA evidence it would not have had if trial had proceeded as originally scheduled. This is not the kind of impairment, such as loss of exculpatory evidence and dimming memories, discussed in Barker. In fact, the DNA evidence obtained as a result of the delay in this case might have exonerated appellant. Appellant does not argue that he was prevented from obtaining other exculpatory evidence as a result of the delay or that his defense was otherwise impaired. Under these circumstances, we conclude appellant failed to demonstrate prejudice. This factor weighs against finding a violation of his speedy trial right.

Finally, having reviewed the four *Barker* factors, the fact that trial was delayed for approximately twenty months and appellant repeatedly asserted his right to a speedy trial weigh in favor of finding a violation of appellant's speedy trial right. However, weighing against finding a violation is the fact that appellant failed to demonstrate prejudice. Further, although delay as a result of a crowded trial docket weighs against the State, though not heavily, much of the delay is attributable to the crime lab's delay in

obtaining DNA results, and not intentional delay by the State. Appellant himself sought a continuance to review the DNA evidence, and this further delayed his trial. We conclude that the weight of the four factors, balanced together, is against finding a violation of appellant's speedy trial right. *See Barker*, 407 U.S. at 534; *Dragoo*, 96 S.W.3d at 316. We overrule appellant's sole issue.

We affirm the trial court's judgment.

/s/
DAVID L. BRIDGES
JUSTICE

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-07-00729-CR

[Filed June 30, 2008]

JAMES HENRY RHONE,
Appellant

V.

THE STATE OF TEXAS,
Appellee

Appeal from the 336th District Court of
Grayson County, Texas (Tr.Ct.No. 053339-336)

Opinion delivered by Justice Bridges, Justices
Wright and Mazzant participating.

Based on the Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

Judgment entered June 30, 2008.

/s/
DAVID L. BRIDGES
JUSTICE

APPENDIX B

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

[United States Postage OCT 29, 2008
Mailed from Zip Code 78701]

Wednesday, October 29, 2008
Re: Case No. PD-1102-08
COA#: 05-07-00729-CR
STYLE: RHONE, JAMES HENRY

On this day, the Appellant's petition for discretionary review has been refused.

Louise Pearson, Clerk

ROBERT UDASHEN
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SUITE 400
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APPENDIX C

IN THE DISTRICT COURT
336TH JUDICIAL DISTRICT
GRAYSON COUNTY, TEXAS

No. 053339

[Filed January 3, 2007]

STATE OF TEXAS	)
	)
vs.	)
	)
JAMES HENRY RHONE	)
	)

MOTION TO DISMISS FOR FAILURE TO AFFORD SPEEDY TRIAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW JAMES HENRY RHONE, Defendant, and files this Motion to Dismiss for Failure to Afford Speedy Trial and would show this Court the following:

I.

Defendant was arrested for the offense of sexual assault of a child on September 6, 2005. Defendant was released from custody after posting bond and was

directed to appear in the 336th District Court of Grayson County on October 20, 2005.

II.

Defendant retained the undersigned counsel who appeared in court with Defendant on October 20, 2005. This case was then passed for a plea conference on November 23, 2005, and for another plea conference on December 9, 2005. The case was not resolved by a plea and the case was set for jury trial on March 20, 2006. Prior to that trial date, the State requested a continuance of the trial date. The State's request was granted over Defendant's objection. The case was rest for trial on August 21, 2006. Once again, the State asked for a continuance of the trial date. That request was granted over Defendant's objection. The case was then reset for trial on January 15, 2007.

III.

Defendant filed demands for a speedy trial on March 13, 2006, and on July 13, 2006. Those requests were not granted.

IV.

The Sixth Amendment to the United States Constitution, as extended to the states through the Fourteenth Amendment, guarantees a person accused of a crime the right to a speedy trial. *Klopfer v. North Carolina,* 386 U.S. 213, 222, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). Similarly, the Texas Constitution guarantees the right to a speedy trial. TEX. CONST., art. 1, §10; *Hull v. State,* 699 S.W.2d 220, 221 (Tex. Crim. App. 1985). The inquiry as to whether the accused's right to

a speedy trial has been violated is the same under both the United States and the Texas Constitutions. *Floyd v. State,* 959 S.W.2d 706, 709 (Tex. App. - Fort Worth 1998, no pet.).

This Court must balance four factors when analyzing whether a defendant has been denied his right to a speedy trial. Those factors are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. *Barker v. Wingo,* 407U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Johnson v. State,* 954 S.W.2d 770, 771 (Tex. Crim. App. 1997).

Texas courts have generally found a delay beyond eight months to be presumptively prejudicial, thus triggering further analysis of speedy trial claims. *See, Harris v. State,* 827 S.W.2d 949, 956 (Tex. Crim. App. 1992); *Floyd v. State, supra* at 710. Upon a finding that a presumptively prejudicial delay has occurred, the State bears the initial burden of justifying the delay. *Emery v. State,* 881 S.W.2d 702, 708 (Tex Crim. App. 1994). This is because the primary burden is on the State and the trial courts to ensure that defendants are afforded their right to a speedy trial. *Chapman v. Evans,* 744 S.W.2d 133, 136 (Tex. Crim. App. 1988).

V.

The delay in this case is more than eight months. It is therefore the State's burden to justify the delay.

VI.

The delay from arrest to the current trial setting of this case prejudiced Defendant in that Defendant

suffered extreme anxiety and worry during the delay. In addition, Defendant, who is a dentist, lost his dental practice during the delay of this case due directly to the pendency of this case. More importantly, the delay prejudiced Defendant in that the State was allowed to gather DNA evidence against Defendant during the delay and thus strengthen its case against Defendant. If Defendant had gone to trial in March of 2006 when this case was originally set, the State would not have had DNA evidence to use against Defendant.

FOR THE ABOVE REASONS, Defendant respectfully asks that this case be dismissed, with prejudice, for failure to afford Defendant a speedy trial.

Respectfully submitted,

/s/_____

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Attorneys for Defendant

CERTIFICATE OF SERVICE

On the 3rd day of January, 2007, a true and correct copy of the Motion to Dismiss for Failure to Afford Speedy Trial was delivered to Karla Hackett, Assistant District Attorney, 200 S. Crockett Street, Suite 116A, Sherman, Texas 75090.

/s/_____
Robert N. Udashen. P.C.

ORDER

On this day came on to be heard the motion of James Henry Rhone to dismiss this cause for failure to afford a speedy trial. The Court, after considering same, is of the opinion that said motion should be ~~(GRANTED)~~ (DENIED).

IT IS THEREFORE ORDERED that this cause is hereby DISMISSED with prejudice.

SIGNED this 22 day of Feb, 2007.

/s/
JUDGE PRESIDING

APPENDIX D

IN THE DISTRICT COURT
GRAYSON COUNTY, TEXAS
336TH JUDICIAL DISTRICT

REPORTER'S RECORD
VOLUME 2 OF 6 VOLUMES
TRIAL COURT CAUSE NO. 53339-336

THE STATE OF TEXAS	)
	)
VS.	)
	)
JAMES HENRY RHONE	)
	)

* * * HEARING ON MOTIONS * * *

On the 22nd day of February, 2007, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable LAURINE J. BLAKE, Judge presiding, held in SHERMAN, GRAYSON COUNTY, TEXAS;

Proceedings reported by machine shorthand.

Paula Thomas, CSR, RPR
336th District Court

* * *

[p.36]

Honor.

THE COURT: Okay. You can proceed on your motion for speedy trial.

MR. UDASHEN: No, Judge, actually this is a motion -- this is a motion to dismiss for failure to afford a speedy trial. And what I would ask the Court to do first, simply take judicial notice of the court's file in this case, and maybe just refresh the Court's memory, if I could.

THE COURT: Yes.

MR. UDASHEN: Based on the file, this case was -- well, I guess Dr. Rhone was originally arrested back on September 6, 2005. He was directed to appear in this court on October 20, 2005, and he did. Then, the case was set October 20, 2005. We had a conference on November 23, 2005, and another conference December 9, 2005. We were unable to resolve the case. We had our first trial setting on March 20, 2006. Prior to that trial date the State filed a motion for continuance of the trial date. We objected and requested a speedy trial at that time. The State's request for continuance was granted over our objection. And the case was reset for trial on August 21st, 2006. The State again asked for a continuance of that trial date. Again, a continuance was granted over our

[p.37]

objection, and we requested a speedy trial at that time. The case was reset for trial on January 15, 2007. And

prior to that date, I obtained from the State a report on DNA analysis in this case, and filed an additional motion for continuance conditioned on the Court ruling on the motion to dismiss for failure to afford a speedy trial, which is what I'm bringing to the Court's attention at this time.

The condition of our request for continuance at that time was to, if the case was not dismissed, we needed time to do our own DNA analysis of the materials that the State obtained in this case.

I think all of that would be reflected in the court's file, and the Court can take judicial notice. I would offer some brief testimony from Dr. Rhone as to -- in support of the motion.

THE COURT: You may, sir.

Sir, if you'll come forward and have a seat on the witness stand, please. If you'll raise your right hand.

(The witness was sworn by the Court)

THE COURT: You may have a seat.

(No omissions)

[p.38]

DR. JAMES RHONE,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION

BY MR. UDASHEN:

Q. Would you state your name for the Court, please?

A. James Rhone.

Q. And, Dr. Rhone, you are the defendant in this case; is that correct?

A. Yes.

Q. You were arrested in this case back in September, on September 6, 2005; is that right?

A. Yes.

Q. And then we appeared in court for the first time on October 20, 2005?

A. Yes.

Q. Okay. Now, Dr. Rhone, do you recall that your case was set for trial for the first time on March 20, 2006?

A. Yes.

Q. Were you prepared to go to trial on that day?

A. Yes.

Q. And, in fact, we opposed the State's motion for continuance of that trial date; is that correct?

A. Yes.

[p.39]

Q. And, then, do you recall that your case was set again for trial on August 21, 2006?

A. Yes.

Q. Were you prepared to go to trial on that day?

A. Yes.

Q. And did we also oppose the State's request for continuance at that trial date?

A. Yes.

Q. Can you tell the Judge, at the time you were arrested in this case, how were you employed, Dr. Rhone?

A. I was a partner in a group dental practice and I have been there since 1989.

Q. Okay. And as a result of this case pending in this court, have you lost that employment?

A. Yes. My partners, since this has been pending so long, they voted me out, and had me removed from the office.

Q. Now, have you made an effort to find another job while this case has been pending?

A. I have.

Q. Where have you applied for jobs?

A. I have applied at actually one of the prisons out in Tarrant County, and also applied at John Peter Smith in Fort Worth. I heard nothing. I have heard nothing back either way.

[p.40]

Q. During the time that this case has been pending, has it caused you to worry, have you been anxious about it, things of that nature?

A. Oh, yes. During that time I also had to sell my house and move in with my father.

Q. And is that a result of having lost your job, not having the financial ability to maintain the house?

A. Yes.

Q. At the time this case was originally set for trial in March, also when the case was set for trial in August, is it your understanding that the State at that time did not have any DNA evidence in the case?

A. Yes.

Q. Is it your understanding now, based on reports that I have given to you, that the State does now have DNA evidence in the case?

A. Yes.

Q. And if we had gone to trial back in March of 2006 or in August of 2006, the State would not have had that evidence to use against you; is that correct?

A. Yes.

Q. And have I talked to you about the fact that that delay in the case has allowed the State to, in effect, strengthen their case against you?

A. Yes.

[p. 41]

MR. UDASHEN: I'll pass the witness, Your Honor.

CROSS-EXAMINATION

BY MS. HACKETT:

Q. Did the fact that you were kicked out of your dental practice have anything to do with the fact that you had paid off the victim and his family in the case, in which was made them aware that there was at least some issue on your part that you know you were guilty?

A. No.

Q. Didn't have anything to do with the nature of the offense, just that a case was pending?

A. Had to do with the fact that I was indicted.

Q. For the offense that you were indicted for --

A. Yes.

Q. - - sexual assault of a child?

A. Yes.

Q. Do you understand why your partners might have been uncomfortable with that?

A. Yes.

Q. Now, this particular case on November 23rd of '05, I have a notation that we had a first appearance, however, your attorney did not appear at that time, for some medical reason; do you recall that?

A. I do not recall that at all.

[p.42]

Q. How about 12-9-05, where there was actually a plea conference?

A. We were here.

Q. Do you recall coming here that December of '05?

A. Yes.

MS. HACKETT: We have no further questions.

MR. UDASHEN: Nothing further, Your Honor.

THE COURT: Sir, you may step down.

THE WITNESS: Thank you.

MR. UDASHEN: We'll rest on the motion, Your Honor.

MS. HACKETT: We have no evidence to present, Your Honor.

MR. UDASHEN: We close, Your Honor.

THE COURT: Ms. Baugh, refresh my recollection when you became responsible for this case.

MS. HACKETT: We received the case into our court, it would have been the end of November for first setting, and that would require us just to screen for an original plea offer. Our plea conference was set for December 9th, and the trial was set sometime end of February. Early March is when we discovered that the

[p.43]

DNA samples that had been taken from the child victim in this case had not been sent off. At that point we immediately had them sent off, obtained the warrant, obtained the samples from Dr. Rhone, then sent them to the lab. My recollection is the sample from the affidavit of the search warrant was for 13th of March. So that was actually subsequent to the trial date, because it does take so long for DNA results to come in.

THE COURT: I think the March date was showing the 20th. Then the motion for --

MS. HACKETT: March 20th is when we had our motion for continuance, March 13th is when we obtained the samples and sent them off.

THE COURT: I'm sorry. Trial date was

set March 20. I thought you said getting the warrant was after the trial.

MS. HACKETT: No, we got the warrant before the trial. It was on the 13th.

THE COURT: Okay. I'm with you.

MS. HACKETT: So a week before trial we did get the -- we finally got the samples, were able to send everything off. Obviously, it takes more than a week for us to get DNA results back, unlike on CSI. I would love to have the 15-minute turnaround. We were told by the lab it would be July when we would get our

[p.44]

results back, so we set the trial for August.

In August -- or in July, we found out that the results were not going to be back. We filed for another continuance to wait on those lab results, with a letter being entered into the record from Lorna Beasley at the DPS crime lab in Garland at that time stating because of personnel issues where they had multiple people quit, they had to rehire, retrain, and they became quite backlogged. She then indicated it would probably be November. We actually got the results back early December from the sheriff's department. And then they were forwarded on to defense attorney at that time.

Because of those results, the defense attorney then asked for a continuance himself from the January setting in order to get his own DNA expert, his own analysis.

He did request another motion to dismiss for speedy trial violation at that time. My understanding of the speedy trial does not require a certain time table. Certainly, the docket has to be flexible enough to take into account evidentiary issues. There was a six-month gap from when the police officer first investigated this case until we got the case, or maybe a little less than six months before we were able to ascertain that there was a problem and get everything

[p.45]

sent off.

THE COURT: What's your recollection about the motion to quash the subpoenas for the settlement?

MS. HACKETT: We found that there was a civil settlement while preparing for the case for last March, and found out that the victims -- we were aware that the victims had been contacted by the defendant, because the defense attorney he had hired in the civil case had prepared affidavits asking for the case not to be prosecuted. The case was indicted in spite of that.

We became aware that there was a financial settlement, began our efforts to locate the settlement papers to find out exactly what that settlement was. That was actually -- I don't remember when we found out, when it was -- I know it was close to the time of the trial itself. If the Court could refresh my memory on what date that motion to quash hearing was, because they filed the motion to quash and --

THE COURT: Showing to be filed March 10, 2006.

MS. HACKETT: So it was done --

THE COURT: March 8th.

MS. HACKETT: So we found out a few weeks before the trial, maybe three to four weeks before the

[p.46]

trial, that there was a settlement, there were papers available. We started hunting for them, and this is where we ended up.

THE COURT: Anything you would like to offer further, Mr. Udashen?

MR. UDASHEN: If I could make a few comments, Your Honor? The offense in this case allegedly occurred in March of 2005. Clearly the State had seized some kind of DNA samples from the alleged victim in the case back at that time. They apparently never sent them off to a lab. The case -- Mr. Rhone came in the court in the fall of 2005, he was arrested, he was appearing in court, then we set the case for trial in March of 2006. And as Ms. Baugh said, apparently the State didn't realize they had samples to test, and then shortly before the trial setting asked for a continuance to get the samples tested.

I would just point out to the Court that while Ms. Baugh is correct, that the standards for speedy trial are flexible, there is also a presumption in the case law that's cited in my motion that if there is a delay of more than eight months, the State has to justify the delay. The delay in this case has been because of their

own negligence in not submitting the samples in a timely manner for testing. They sat on

[p.47]

them for a number of months, but they never sent the samples to the lab. And the State Department of Public Safety lab, it took a number of more months to get the samples tested before we got results back.

None of that has anything to do with Dr. Rhone. We were here on the first two trial settings, prepared to go to trial, opposed the State's continuance motion.

The State, other than the fact that DPS had lost some people, and they failed to discover that they had samples that could be sent off for testing, has not offered any legal justification for the delay in this case. And I would think that the case should be dismissed for failure for a speedy trial.

THE COURT: I also want to have the record reflect in the year of 2006, there is 52 weeks in the year, we had 37 jury trials. Of those 37 jury trials, 16 were in the neighboring county of Fannin, 21 were in this county. Approximately 18 or 19 of those 21 jury trials were inmate cases, which take priority over people out on bond. The court tried two civil cases and the rest were inmate cases, practically. I think we might have had a total of five jury trials last year that were not inmate cases. I would have the record reflect that as well.

[p.48]

The Court will deny the motion for speedy trial.

Is there anything further we need to address in this matter?

MS. HACKETT: Nothing from the State.

MR. UDASHEN: No, Your Honor.

THE COURT: Do we have all the other dates that you all need?

MS. HACKETT: We do. We have already completed pretrials, and jury trial is set for May 21st.

MR. UDASHEN: That's correct, Your Honor.

MS. HACKETT: For the record, we actually did try to set it earlier than that. There was some conflicts defense counsel had.

THE COURT: What was the trial date?

MS. HACKETT: May 21st.

THE COURT: Okay. That's already been set. That was set January 15th.

MS. HACKETT: Correct.

MR. UDASHEN: Right.

THE COURT: We'll see everybody at that time, and we're expecting how many day trial?

MS. HACKETT: I would say at least three.

MR. UDASHEN: I would agree with that, Your Honor.

[p. 49]

THE COURT: Okay. Very good. Do we need a panel larger than 50?

MS. HACKETT: I would.

THE COURT: Sixty-two.

All right. Thank you very much.

MR. UDASHEN: Thank you, Judge.

(Conclusion)

[p.50]

REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF GRAYSON/FANNIN)

I, PAULA THOMAS, Official Court Reporter in and for the 336th District Court of Grayson/Fannin County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $ _____ and was paid by_____.

WITNESS MY OFFICIAL HAND this the 12th day of August, 2007.

/s/_____
Paula Thomas, Texas CSR 2820
Expiration Date: 12/31/2008
Official Court Reporter
336th District Court
Grayson/Fannin County, Texas
Sherman, Texas

APPENDIX E

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.